(3)

No. 03-929

In The

Supreme Court of the United States

JOHN A. RAPANOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICUS CURIAE

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as Amicus Curiae in support of Petitioner. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 215,000 builder and associate members throughout the United States. Its members include not only individuals and firms that construct and supply single-family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. NAHB is the voice of the American shelter industry. Through the regular course of operating their businesses, NAHB's members are subject to regulations under the Clean Water Act ("CWA"). Therefore, NAHB is knowledgeable of the ramifications of inequitable regulatory actions and time-consuming processes that are often involved with land development.

NAHB is of counsel to James and Rebecca Deaton, landowners from Wicomico County, Maryland, who have submitted a petition that is pending before this Court and raises similar issues to those presented in Mr. Rapanos's petition. *See James S. Deaton, et ux. v. United States,* No. 03-701 (filed Nov. 13, 2003). The United States filed its response to the Deatons' petition on January 30, 2004. Mr. Rapanos's petition, like the Deatons' petition, presents another opportunity for this Court to resolve the conflict

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[1] Pursuant to Rule 37.6 of this Court, Amicus Curiae states that its counsel authored this brief and amicus paid for it. The brief was not written in whole or part by counsel for a party, and no one other than amicus made monetary contribution to its preparation.

and confusion regarding the scope of CWA "navigable waters" that is plaguing the lower courts, regulated officials, and our members who seek to develop their property.

Additionally, NAHB has been before the Court as *amicus curiae* or "of counsel" to the landowner in a significant number of land regulation cases. These include *Agins v. City of Tiburon,* 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego,* 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County,* 482 U.S. 304 (1987); *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987); *Yee v. City of Escondido,* 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992); *Dolan v. City of Tigard,* 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Or.,* 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs,* 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.,* 538 U.S. 188 (2003); *S. Fl. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 280 F.3d 1364, *cert. granted in part,* 123 S. Ct. 2638 (June 27, 2003) (No. 02-262) (argued Jan. 14, 2004).

SUMMARY OF THE ARGUMENT

There is a direct conflict between the Fourth and Sixth Circuits on the one hand, and the Fifth Circuit on the other, regarding the scope of "navigable waters" under the Clean Water Act ("CWA" or the "Act"). The Fourth and Sixth Circuits support an expansive, virtually limitless theory of federal jurisdiction. They endorse an approach that allows the U.S. Army Corps of Engineers ("Corps") to assert control over features like ordinary ditches, drains and swales, merely if they have "some" connection or a "potential" link to truly navigable waters. The Fifth Circuit rejects such an expansive theory. It has expressly disavowed the opinions of its sister circuits, and instead requires a "direct, proximate" connection to navigable waters to justify the assertion of CWA jurisdiction – and thus the imposition of federal permitting and penalty requirements under the Act.

In this regard, the Fifth Circuit has been faithful to the mode of analysis employed by this Court, which has been largely ignored by the Fourth and Sixth Circuits. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) ("*Riverside*"), the Court upheld CWA jurisdiction over adjacent wetlands based on record evidence showing they "actually abut[ted]" and were "inextricably intertwined" with navigable waters. In *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"), the Court clarified *Riverside* in rejecting CWA jurisdiction over non-adjacent, isolated ponds that lacked a "significant nexus" to navigable waters.

Certiorari is warranted to definitely resolve the split between the circuits and their divergent interpretations of

Riverside and *SWANCC*. This Court's guidance is necessary because, after soliciting public input on the extent of CWA jurisdiction following the *SWANCC* decision, the agencies abruptly announced in December 2003 that they would abandon their efforts to issue "a new rule on federal regulatory jurisdiction over isolated wetlands."[2] Thus, the agencies relegated thousands of pages of public comments to doorstop status. Accordingly, with no regulatory guidance forthcoming from the Corps or EPA, this Court is the only realistically available forum to make sense of the judicial quagmire and provide landowners and regulatory agencies with some rationale for determining what falls within – and what falls outside – Corps and EPA authority. Without this Court's review, CWA jurisdiction will depend on the wholly fortuitous circumstance of where, and in what Circuit, the property at issue is located.

ARGUMENT

I. THE CLEAR SPLIT AMONG THE CIRCUIT COURTS OF APPEAL WARRANTS THIS COURT'S REVIEW.

In the last five months, four petitions have been submitted to this Court asking for guidance on the extent of federal CWA jurisdiction over "navigable waters."[3] With

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[2] *See* Press Release, Environmental Protection Agency and U.S. Army Corps of Engineers, EPA and Army Corps Issue Wetlands Decision, (December 16, 2003) ("December 16th Press Release"), *available at* http://www.epa.gov/newsroom.

[3] *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3451 (U.S. Dec. 22, 2003) (No. 03-929) ("*Rapanos*"); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *petition for cert. filed*, 92 U.S.L.W. 3356

the filing of Mr. Rapanos's petition, three of them are now pending before the Court. The Court's involvement is necessary to address the split among the Circuit Courts of Appeal that has arisen.

A. Fourth and Sixth Circuits: "Some Connection" to Navigable Waters is Enough to Support CWA Jurisdiction.

In *Deaton* and *Rapanos*, the Corps asserted federal authority over remote drainage ditches that were miles away from navigable waters. The Fourth and Sixth Circuits, respectively, used the exact same language in upholding the Corps's authority:

> The regulation, as the Corps reads it, reflects a reasonable interpretation of the Clean Water Act. The Act thus reaches to the roadside ditch and its adjacent wetlands.

Deaton, 332 F.3d at 712; *Rapanos,* 339 F.3d at 452-53. As a consequence, both circuits have accepted as proper the Corps's apparent unrestricted ability to exert regulatory jurisdiction "over the whole tributary system of any navigable waterway []." *Deaton,* 332 F.3d at 712; *Rapanos,* 339 F.3d at 452-53.

In *Deaton*, the property is comprised of a twelve-acre parcel in rural Wicomico County, Maryland. *Deaton,* 332 F.3d at 702. The roadside ditch at issue is

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(U.S. Nov. 13, 2003) (No. 03-701) ("*Deaton*"); *United States v. Rueth Development Co.,* 335 F.3d 598 (7th Cir. 2003), *cert. denied,* 124 S. Ct. 835 (Dec. 1, 2003); *Treacy v. Newdunn Assocs. LLP,* 344 F.3d 416 (4th Cir. 2003), *petition for cert. filed,* 72 U.S.L.W. 3310 (U.S. Oct. 27, 2003) (No. 03-637).

approximately two to three feet wide and at times carries water[4] and at other times is dry. *Deaton* Cert. Pet. at 5; *Deaton* Cert. Pet. App. at 78a (picture of roadside ditch). It "runs alongside the road between the pavement and the Deatons' property." *Deaton,* 332 F.3d at 702. The roadside ditch lies over eight miles from the nearest navigable-in-fact water, the Wicomico River, and "takes a winding, thirty-two-mile path to the Chesapeake Bay." *Deaton,* 332 F.3d at 702; *Deaton* Cert. Pet. at 5. The Corps never established that any sediment ever left the Deatons' property, or reached the roadside ditch. Nor did the Corps ever prove that water from the roadside ditch reached downstream navigable waters, or that sediment caused any damage to distant navigable waters. *See Deaton* Cert. Pet. at 7-8. (discussion of dye test). Indeed, a series of obstructions that includes five dams, three ponds and five culverts separates the Deatons' property from the Wicomico River. *See Deaton* Cert. Pet. App. at 77a.

Accepting the Corps' assertion of jurisdiction over tributaries as extending "to any branch of a tributary system that *eventually flows* into a navigable body of water[,]" the Fourth Circuit in *Deaton* found that there was simply "*a nexus* between a navigable waterway and its nonnavigable tributaries." *Deaton,* 332 F.3d at 711 and 712 (emphasis added). The Fourth Circuit misinterpreted *SWANCC* as "*suggesting* that covered non-navigable waters are those with *'some connection'* to navigable ones." *Deaton,* 332 F.3d at 709 (emphasis added).

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[4] The Fourth Circuit recognized that the parties were unable to agree on the amount of water and the consistency of the flow in the ditch. *Deaton,* 332 F.3d at 702; *Deaton* Cert. Pet. at 12.

Similar to the Deaton property, Mr. Rapanos's property is described as a "one hundred and seventy-five-acre plot of land in Williams Township, Bay County, Michigan." *Rapanos,* 339 F.3d at 448. In describing Mr. Rapanos's property, the District Court stated:

> [His] property is not directly adjacent to a navigable body of water; it is over twenty miles from Saginaw Bay, and it is roughly twenty miles from where the Kawkawlin River – the nearest body of navigable water – becomes navigable .... Like [Mr. Rapanos's] property itself, the wetlands were not directly adjacent to either the Saginaw Bay or the Kakawlin River.

United States v. Rapanos, 190 F. Supp. 2d 1011, 1012 (E.D. Mich. 2002), *rev'd* 339 F.3d 447 (6th Cir. 2003), *petition for cert. filed,* 72 U.S.L.W. 3451 (U.S. Dec. 22, 2003) (No. 03-929). Water leaving the Rapanos property traverses a ditch, "dubbed the Labozinski drain, which empties into Hoppler Creek, which eventually winds its way into the Kawkawlin River, which in turn flows into Saginaw Bay." *Rapanos,* 190 F. Supp. 2d at 1014-15.

The district court, on remand from the Sixth Circuit following this Court's initial grant of certiorari,[5] disclaimed jurisdiction under *SWANCC.* The district court found "as a

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[5] On certiorari, the Supreme Court, in *Rapanos v. United States,* 533 U.S. 913 (2001), vacated the judgment and remanded for further consideration in light of *SWANCC.* On remand, the District Court dismissed. *See United States v. Rapanos,* 190 F. Supp. 2d 1011 (E.D. Mich. 2002). The Sixth Circuit reversed on appeal, 339 F.3d 447 (6th Cir. 2003), and that decision is the subject of the present Petition.

matter of law," that Mr. Rapanos's wetlands were not directly adjacent to navigable waters and therefore, under both *SWANCC* and *Riverside Bayview,* the federal government could not regulate them. *Rapanos,* 190 F. Supp. 2d at 1012.

On appeal, the Sixth Circuit disagreed with the lower court and, despite the distance between the wetlands and the navigable waters, held that there was "an ample nexus to establish jurisdiction" because Mr. Rapanos's wetlands were "adjacent" to a drain and a river. 339 F.3d at 453 (citing *Riverside Bayview,* 474 U.S. at 133). Continuing its analysis, the Sixth Circuit adopted the Fourth Circuit's analysis from *Deaton*: "[b]ecause we find the Fourth Circuit's reasoning persuasive, we disagree with the broad interpretation of *Solid Waste* taken by the district court in this case, *Rapanos,* 190 F. Supp. 2d at 1016, and, instead, agree with *Deaton,* 332 F.3d 698 at 708-9." *Rapanos,* 339 F.3d at 454.

In *Deaton* and *Rapanos*, despite the remoteness of the wetlands to navigable waters, and despite the lack of evidence of any impact in each instance, the Fourth and Sixth Circuits (respectively) held that these remote wetlands and roadside ditches fell within the sphere of the Corps' regulatory authority under the CWA. *Deaton,* 332 F.3d at 708, 711-12; *Rapanos,* 339 F.3d at 453. Significantly, both the Fourth and Sixth Circuits' purposeful choice of words disserved the principle announced by this Court in requiring a "significant nexus" to navigable waters. In *Deaton,* the Fourth Circuit found "a nexus" or "some connection" sufficient. *Deaton,* 332 F.3d at 711, 709 respectively. *Rapanos,* relying heavily on *Deaton,* found an "ample nexus" sufficient. *Rapanos,* 339 F.3d at 453.

B. Fifth Circuit: "Some Connection" is Not Enough – There Must be a "Direct, Proximate Link" to Navigable Waters to Support CWA Jurisdiction.

Unlike *Deaton* and *Rapanos*, the Fifth Circuit flatly rejected the United States' overbroad definition of "navigable waters" as covering "all waters, excluding groundwater, that have any hydrological connection with 'navigable water.'" *In re Needham,* 354 F.3d 340, 345 (5th Cir. Dec. 15, 2003) ("*Needham*") (citing 40 C.F.R. § 300.5 (2003)). *See also Rice v. Harken Exploration Co.,* 250 F.3d 264, 269-70 (5th Cir. 2001) ("*Rice*"). Recognizing that the Fourth Circuit in *Deaton,* 332 F.3d at 702, and the Sixth Circuit in *Rapanos*, 339 F.3d at 449, agreed with the government's "expansive treatment," the Fifth Circuit countered by holding that in its view, such an all-inclusive definition is "unsustainable under *SWANCC*." 354 F.3d at 345 The Fifth Circuit stated:

> In our view, [the government's] definition [of 'navigable waters'] is unsustainable under *SWANCC.* The CWA and the OPA are not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters. Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* 'a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water.'

Needham, 354 F.3d 345-46 (internal citations omitted) (citing *Rice v. Harken Exploration Co.,* 250 F.3d 264, 269 (5th Cir. 2001)).

While the United States may declare that the Fifth Circuit's decision regarding the above-quoted language is dicta, in order to downplay the split among the circuits, that is simply not the case.[6] Rather, the Fifth Circuit adopted very precise language to emphasize that its position conflicted with the Fourth and Sixth Circuits when it held: "[I]n this circuit, the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like . . . ." *Needham,* 354 F.3d at 345. The Fifth Circuit correctly applied the adjacency requirements of *SWANCC* recognizing that "the Clean Water Act . . . [is] not so broad as to permit the federal government to impose regulations

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[6] In its Opposition in *Deaton,* the federal government dismissed any such conflict stating the *Needham* decision "does not squarely conflict" with the Fourth Circuit's decision in *Deaton.* Brief for the United States in Opposition at 18-19, *United States v. Deaton,* 332 F.3d 698 (4th Cir. 2003), *petition for cert. filed,* 92 U.S.L.W. 3356 (U.S. Nov. 13, 2003) (No. 03-701). Conversely, the majority of Amici Curiae filing petitions in support of the Deatons discuss this conflict among the circuits. *See, e.g.,* Brief of Amicus Curiae Hon. John R. Duncan, Jr., in Support of Petitioners at 15-16, *United States v. Deaton,* 332 F.3d 698 (4th Cir. 2003), *petition for cert. filed,* 92 U.S.L.W. 3356 (U.S. Nov. 13, 2003) (No. 03-701); Brief of Amicus Curiae of the National Mining Association in Support of the Petition at 7-8, *United States v. Deaton,* 332 F.3d 698 (4th Cir. 2003), *petition for cert. filed,* 92 U.S.L.W. 3356 (U.S. Nov. 13, 2003) (No. 03-701); Brief of Amicus Curiae of the Beaver Dam Public Drainage Association and John A. Rapanos in Support of the Petition at 56, 13-14, *United States v. Deaton,* 332 F.3d 698 (4th Cir. 2003), *petition for cert. filed,* 92 U.S.L.W. 3356 (U.S. Nov. 13, 2003) (No. 03-701).

over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters." *Id.* (citing *Rice,* 250 F.3d at 269).

Needham's faithful adherence to *Riverside* and *SWANCC* entrenches the view of the Fifth Circuit, as earlier announced in *Rice v. Harken Exploration Co.,* 250 F.3d 264 (5th Cir. 2001). In *Rice,* decided just after *SWANCC,* the Fifth Circuit held that under *SWANCC,* "a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water." *Rice,* 250 F.3d at 269. The court held that there was nothing to indicate that the creek at issue, or other unnamed intermittent creeks were "sufficiently linked" to the navigable-in-fact water. *Id.* at 271. Further, the court held that there must be "a close, direct and proximate link between . . . [the] discharges of oil and any resulting actual, identifiable oil contamination of natural surface water that satisfies the jurisdictional requirements of the OPA. *Id.* at 272. *See also Needham,* 354 F.3d at 346, n.9 (citing *Rice,* 250 F.3d at 272).

In *Needham,* the court reaffirmed the adjacency requirement identified in *Rice,* when it held "the term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway. [] Rather, adjacency necessarily implicates a 'significant nexus' between the water in question and the navigable-in-fact waterway." *Needham,* 354 F.3d at 346 and n.12 (citing *SWANCC,* 531 U.S. at 167; identifying the Corps' definition of adjacency as meaning "bordering, contiguous, or neighboring" in 33 C.F.R. § 328.3, and recognizing partial invalidation of that regulation by *SWANCC*).

In issuing the *Needham* opinion, the Fifth Circuit clearly identifies its position as being contrary to its sister circuits. Accordingly, the Court's review is necessary to resolve the appellate split that has emerged since *SWANCC*.

II. THE CONFUSION CREATED BY THE REGULATORY AGENCIES IN THE FIELD COMPELS THIS COURT'S INVOLVEMENT.

A. The Corps and EPA's Failure to Issue Guidance Furthers Confusion Over the Extent of Their Jurisdiction.

While multiple petitions addressing the meaning of "navigable waters" have been filed recently with the Court, Congress and the agencies have been struggling with the extent of CWA jurisdiction ever since *SWANCC* came down in 2001. Indeed, Congress held a hearing on the regulatory implications of *SWANCC*, which led to a promise from the Corps and EPA that they would clarify the scope of CWA jurisdiction to benefit both their field offices and the regulated community. But the agencies have broken their promise. They have made it clear that no regulatory guidance, in a rulemaking or otherwise, is forthcoming. *See* Press Release, Environmental Protection Agency and U.S. Army Corps of Engineers, EPA and Army Corps Issue Wetlands Decision (December 16, 2003) ("December 16th Press Release"), *available at* http://www.epa.gov/newsroom.

In 2002, the House Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, chaired by Representative Doug Ose, held a hearing concerning the EPA and Corps implementation of this Court's *SWANCC* decision. *See Agency Implementation of the SWANCC*

Decision: Hearing Before the Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs of the Comm. on Government Reform, 107th Cong. 2d Sess. (2002) (statement of Rep. Doug Ose, Chairman) ("Subcomm. Hearing"). During that hearing, Representative Ose recognized that the agencies' approach to determining CWA jurisdiction "has resulted in widely varying interpretations of the scope of jurisdiction . . . ." *Id.* at 2. Furthermore, Representative Ose explained that the "current situation is creating confusion and chaos" for the States[7] in that the lack of agency guidance concerning CWA jurisdiction "hinders States in their ability to implement their own programs to protect wetlands." *Id.* To address the confusion, the EPA and Corps agreed to conduct a rulemaking to clarify their position regarding CWA jurisdiction. Subcomm. Hearing at 32, 36, 38, 41, 53.

In 2003, the Corps and EPA issued an Advanced Notice of Proposed Rulemaking to "ensure that the regulations are consistent with the CWA and the public

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[7] *See also,* Brief of Amici Curiae of the Building Industry Legal Defense Foundation, *et al.* in Support of Petitioners at 2-8, *United States v. Deaton,* 332 F.3d 698 (4th Cir. 2003), *petition for cert. filed,* 92 U.S.L.W. 3356 (U.S. Nov. 13, 2003) (No. 03-701). Amici Curiae discuss specific examples of how water quality regulators in California are "improperly asserting jurisdiction under the CWA." *Id.* at 2. Amici Curiae include in their brief a series of examples such as: (1) regulating a "vertical-walled box culvert as waters of the United States that are swimmable"; (2) declaring a municipal "separate storm sewer system as always considered a Waters of the United States" that includes municipal streets, curbs, and gutters; (3) and best management practices implemented by a regional board that result in micro-management of local practices. *Id.* at 5-7.

understands what waters are subject to CWA jurisdiction." Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States" ("ANPR"), 68 Fed. Reg. 1991, 1993 (2003). Thus, the agencies recognized that their current regulations were causing confusion and that they needed to develop regulations to "clarify[] what waters are subject to CWA jurisdiction." *Id.*

However, after receiving thousands of pages of comments, the agencies announced, one day after the Fifth Circuit released its decision in *Needham,* that they would not move forward with rulemaking or otherwise issue any guidance at all to clarify the confusion. *See* December 16th Press Release. Through their press release, the EPA and Corps declined further agency action stating:

> After soliciting public comment to determine if further regulatory clarification was needed, the EPA and Corps have decided to preserve the federal government's authority to protect our wetlands. The agencies will continue to monitor implementation of this important program to ensure its effectiveness.

December 16th Press Release. The confusion still exists without any expected schedule for clarification from these agencies.

In light of the abandoned rulemaking on *SWANCC,* and without this Court's review, the lower courts have become the final arbiters on the scope of CWA jurisdiction. But they themselves are in a state of disarray. Everyone – including the agencies – will anticipate and scrutinize every federal trial and circuit court opinion in the absence of

reasoned agency decision-making. Indeed, the ANPR itself documents the divergent judicial views concerning those water bodies that are regulated under the CWA and those that are not. In a blatant abdication of their responsibilities, the Corps and EPA directed their field staff to make jurisdictional decisions on a "case-by-case basis" by "considering the relevant court decisions." 68 Fed. Reg. 1991, 1998.

Accordingly, on a nationwide level, property owners run significant risks of being subject to disparate civil and criminal enforcement actions by agencies that recognize the need to clarify their regulations, yet refuse to do so.

B. The Disparate Regulation by Field Staff Stems From Federal Agency Inaction.

Because the agencies have relied on court decisions to direct the public, landowners are now confronted with geographically disparate applications of the CWA. This subjects them to significant criminal and civil penalties based solely upon where their land is situated.[8] Thus, landowners with property in the Sixth and Fourth Circuit states of Kentucky, Michigan, Ohio, Tennessee, Maryland, Virginia, North Carolina, South Carolina and West Virginia are overly regulated because their property has "some connection" to or is "hydrological[ly] connect[ed]" to

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[8] *See also,* Brief of Amicus Curiae of Yellowstone Development LLC in Support of Petitioners, at 9-10, *United States v. Deaton,* 332 F.3d 698 (4th Cir. 2003), *petition for cert. filed,* 92 U.S.L.W. 3356 (U.S. Nov. 13, 2003) (No. 03-701). In its brief, Yellowstone Development discusses the significant due process considerations involved as a result of the Corps' failure to definitely resolve these issues. *Id.*

traditionally navigable waters. *See, e.g., Deaton*, 332 F.3d at 709; *Rapanos*, 339 F.3d at 453.

By contrast, land owned in the Fifth Circuit states of Mississippi, Louisiana and Texas will be regulated using the "significant nexus" standard this Court established in *SWANCC*.[9] Accordingly, jurisdiction in this region of the country will be determined by "a close, direct and proximate link." *See, e.g., Needham*, 354 F.3d at 346.

The Fourth and Sixth Circuit decisions in *Deaton* and *Rapanos* provide real examples of such an uneven exercise of jurisdiction.[10] In both cases, the government did not prove that the wetland activities in question negatively impacted any truly navigable water or that any pollutants were actually added into any truly navigable water.

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[9] Landowners in New Jersey will also be regulated under the "significant nexus" standard. *See FD&P Enterprises, Inc. v. United States Army Corps of Eng'rs,* 239 F. Supp. 2d 509, 516 (D. N.J. 2003). In *FD&P*, the court held that following *SWANCC,* the proper test is no longer the "hydrological connection test" but rather is the "significant nexus" test, as identified in *SWANCC*, for determining jurisdiction under the Clean Water Act. *Id.*

[10] *See e.g.,* Brief of Amici Curiae Nationwide Public Projects Coalition, *et al.* in Support of Petitioners, at 12-15, *United States v. Deaton,* 332 F.3d 698 (4th Cir. 2003), *petition for cert. filed,* 92 U.S.L.W. 3356 (U.S. Nov. 13, 2003) (No. 03-701). In their brief, Amici Curiae identify the practical ramifications of the current circuit split. For example, in EPA Region Four, the region is comprised of states located within the Eleventh, Sixth, Fifth and Fourth Circuits. Thus, Corps and EPA regulators in that region, will be applying divergent standards regarding jurisdiction depending on which state, within Region Four, the site is located. *Id.* at 12.

Furthermore, in both cases, the government did not prove a constant and continuous surface water connection between the wetlands at issue and truly navigable waters. *See, e.g., Deaton* Cert. Pet. at 7-8 (dye test did not prove any hydrological connection between the roadside ditch and navigable waters); *Rapanos,* 190 F. Supp. 2d 1014 (stating that whether the wetlands "had any significant nexus to navigable waters [was] a critical fact left unresolved by the jury in this case"). Yet in both cases the government and the Circuit Courts ignored these facts, with each court holding that the wetlands were jurisdictional. However, in the Fifth Circuit, these facts would certainly be weighed in applying the "significant nexus" test identified by this Court and would likely lead to an opposite conclusion.

Granting certiorari would address the legal vacuum created by such unequal application of enforcement under the CWA, while serving to preserve the stated goals of Congress in enacting this piece of legislation.

CONCLUSION

If the Deatons' roadside ditch or Mr. Rapanos's wetland were located in the Fifth Circuit, they would not be regulated. Whether federal jurisdiction exists under a nationwide regulatory program should not depend on the wholly fortuitous circumstance of where in the country a particular piece of property is located.

The Supreme Court's involvement is urgently needed so the Corps can regulate with consistency and property owners know, up front, if the arm of the federal government properly reaches their land and triggers CWA permitting and penalty requirements.

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Respectfully submitted,

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